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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 525

RUTH K. ARMSTRONG,

Petitioner,

vs.

LEE R. ARMSTRONG,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

In order to correct inaccuracies and omissions in the statement of the petitioner, and for the purpose of presenting all of the facts that may be material to the consideration of the questions involved in relation to the two orders of January 26, 1946, and March 5, 1946, sought to be reviewed herein, the respondent deems it proper to make the following statement:

PRELIMINARY STATEMENT:

At the outset respondent points out that counsel for petitioner refers to and cites, and bases in large part, her contention that the alleged federal question was raised in the courts below, upon (a) her opening brief in the District Court of Appeal; (b) her reply brief; (c) her oral

argument before the Appellate Court; and (d) her petition for rehearing in the District Court of Appeal; none of which constitute any part of the record before this Honorable Court. (See Petition, pp. 8-9.)

DEFAULT INTERLOCUTORY JUDGMENT OF DIVORCE:

On June 19, 1945, a divorce action entitled Ruth K. Armstrong, plaintiff, vs. Lee R. Armstrong, defendant, was commenced in the Superior Court of the County of Los Angeles, State of California. The attorney of record for the plaintiff in said action was Marlan Proctor. The plaintiff alleged in said action that she was a resident of the County of Los Angeles, State of California. [R. 1.] Summons was served on the defendant in Los Angeles County on July 12, 1945. [R. 3.] On July 26, 1945, the default of the defendant was entered by the Clerk of said Superior Court, pursuant to Section 585, subdivision 2, Code of Civil Procedure of California. [R. 2.] An interlocutory judgment of divorce, being a summary judgment by default, was awarded to the plaintiff on August 14, 1945. [R. 4.] Said judgment awarded the custody of the minor children to the plaintiff, and an alleged property settlement agreement between the parties, dated June 15, 1945, was approved. [R. 4.]

MOTION TO SET ASIDE DEFAULT JUDGMENT:

On January 24, 1946, a notice of application to set aside and vacate said interlocutory judgment of divorce was filed in said Superior Court in said action by the defendant, Lee R. Armstrong, under the provisions of Section 473, Code of Civil Procedure of California. [R. 11.] Said notice of application stated that it would be heard on Saturday, January 26, 1946, at the hour of 10:30 o'clock A. M., in the department of the presiding judge

of said Superior Court [R. 11], and was based upon the grounds "that said judgment was made and entered in favor of the plaintiff and against the defendant in said action through and by reason of the mistake, inadvertence, surprise or excusable neglect of said defendant." [R. 11.]

ORDER SHORTENING TIME OF SERVICE:

At the time said notice of application was filed, and as a part thereof, and attached thereto, an order shortening time was made by Hon. Dudley S. Valentine, the presiding judge of said Superior Court, whereby it was ordered that the time for the service of said notice of application to set aside and vacate said interlocutory judgment of divorce be shortened to one day. Said order recited that good cause was shown therefor. [R. 12.] There was attached to said notice of application an affidavit of merits by the defendant, dated January 24, 1946. [R. 12.]

The statement of petitioner that the order shortening time for the service of the notice to set aside said default judgment to one day was obtained "without affidavit or other basis" [p. 2] is incorrect. The record shows that the court acted upon all of the papers in the case, including the notice of motion and the affidavit of merits, and further that the court had notice of the existing emergency under the six months' provision of Section 473 of the Code of Civil Procedure of California. (See Appendix.) [R. 38-39.]

SERVICE OF MOVING PAPERS:

On January 25, 1946, pursuant to said order shortening time, copies of said notice of application, said order shortening time attached thereto, said affidavit of merits, and of the proposed answer of the defendant and the cross-

complaint of the defendant in said action, were served on said Marlan Proctor, the attorney of record for the plaintiff in said action. [See Affidavit of Service, R. 21.] Thereafter, on the same day, the supporting affidavit of the defendant, Lee R. Armstrong, was served on Marlan Proctor, the attorney of record for the plaintiff. Receipt of service of said affidavit was acknowledged by said attorney of record for the plaintiff on January 25, 1946. [R. 21, top of page.] While the specific time on the receipt is noted as "5:05 P. M.," the record shows that the affidavit was taken to the office of the attorney for plaintiff at 4:35 P. M., who was in his office behind closed doors and did not accept service until 5:05 P. M. [R. 40, 53, 89-90.]

The moving papers were also served on the plaintiff personally on January 25, 1946. [R. 22, 27.] While service on the plaintiff was made in Tulare County, California, she was there temporarily only, as her residence was at 710 Lincoln Street, City of Burbank, Los Angeles County, California. [R. 13, bottom of page.]

SUPPORTING AFFIDAVIT OF DEFENDANT:

The supporting affidavit of the defendant, dated January 25, 1946 [R. 13-21], set forth the facts upon which he based said application, showing, among other things, that commencing about 1942 the plaintiff, without the knowledge of the defendant, surreptitiously began and carried on an illicit association with one Earl Francis Cutter, and that she had broken up her home with the defendant on that account, and had taken an unconscionable advantage of the defendant's mental and physical illness resulting from the domestic situation, in order to obtain said divorce and said property settlement agreement. Said affidavit further set forth the facts showing how the defend-

ant discovered the adulterous relationship between his wife and said Earl Francis Cutter as the result of a trip made by said plaintiff and said Cutter in an automobile across the United States and return in November and December, 1945, living and staying together in the illicit relationship of man and wife, although said default judgment was merely an interlocutory judgment of divorce, and that upon their return from said trip the plaintiff and said Cutter moved into and lived together in the former residence of the plaintiff and defendant at 710 Lincoln Street, in the City of Burbank, Los Angeles County, California, where the plaintiff had left the minor children of the parties in the care of a housekeeper. There were attached to said affidavit photostatic copies of hotel registrations in the Hotel Winthrop, Tacoma, Washington, and The St. Michael Hotel, Prescott, Arizona, relating to said allegations of adultery in 1943 and 1945. [R. 13-21.]

APPEARANCE OF PLAINTIFF'S ATTORNEY AT HEARING:

The attorney of record for plaintiff appeared at the appointed time and place in response to the notice of application to set aside said default judgment on January 26, 1946, at 10:30 o'clock A. M. [R. 36.] The plaintiff did not appear in person. Whether she was available and might have appeared had she so elected, is indicated by the following statements by counsel at the hearing:

> "Mr. Shoemaker: * * * she left Earlimart and came to Burbank and she was in communication early last evening with her attorney in Burbank and she had from that time more than twelve hours within which to have made any showing she cared to make in reference to this matter. As far as I have observed she is not present but she was in conference with her attorney last night.

Mr. Proctor: She is not present and I haven't seen her personally and she didn't call me early last evening.

Mr. Shoemaker: I have information definitely that she [fol. 77] called Mr. Proctor around 4 o'clock yesterday afternoon from Earlimart and she left practically immediately for Los Angeles and was in conference with him approximately at 7 o'clock last night at his office in Burbank." [R. 39-40.]

Mr. Proctor made no reply to that statement.

It would appear that Mr. Proctor, by his silence, acquiesced in the definite statement by counsel regarding the availability of the plaintiff, had she desired to appear. Counsel for plaintiff offered no evidence, either written or oral, and made no request whatever of the court for any postponement or continuance. [R. 36-46.]

HEARING ON JANUARY 26, 1946:

Instead of contesting the application upon the merits, counsel for plaintiff elected to make what he characterized as a special appearance "for the purpose of contesting the jurisdiction of the court to proceed at this time and I am here for that purpose only." [R. 36.]

ABSENCE OF ANY OBJECTION ON FEDERAL GROUNDS:

Counsel for plaintiff made no objection to the hearing or proceeding on any federal ground. He failed to mention any claim of lack of due process or any constitutional right, and did not make any objection or claim on any such ground. [R. 36-46.]

JURISDICTIONAL QUESTIONS BASED ON STATE LAW:

His objections were based entirely on alleged defects and irregularities in regard to procedural matters under the statutes of California, such as the manner and time of service of the moving papers, the sufficiency of notice, the authority of the court to shorten the time of service, the sufficiency of the supporting papers, and he argued the general objection that the court was without jurisdiction to proceed because of such claimed defects and irregularities. [R. 36-46.]

Counsel for plaintiff also argued at the hearing on January 26, 1946, that the six months' jurisdictional period to set aside the default judgment under Section 473, Code of Civil Procedure of California, commenced to run at the time of the entry of the default judgment on August 16, 1945, instead of at the time of the entry of the default by the Clerk of said Superior Court on July 26, 1945, and he argued that there was no emergency. [R. 43-44.] Counsel for defendant cited cases indicating that the jurisdictional period commenced to run at the time of the entry of default by the Clerk, in which event the period would expire on January 26, 1946, the date of the hearing. [R. 37.]

ORDER OF JANUARY 26, 1946:

The court concluded that notice and the moving papers were duly served and were sufficient, and that the court had jurisdiction to proceed, and granted the defendant's motion to set aside said judgment, and the defendant was given leave to file his answer and cross-complaint. [R. 46, 23-24.]

PLAINTIFF'S MOTION FOR REHEARING:

Twelve days later, on February 7, 1946, the plaintiff, Ruth K. Armstrong, filed a motion in said Superior Court to set aside the order vacating said default judgment and for a rehearing. [R. 27-38.] That motion was made "for the purpose of permitting a rehearing of defendant's said motion to set aside said interlocutory judgment of divorce, and permitting plaintiff to file and present affidavits at said hearing on the merits of said motion in opposition to defendant's said motion" [R. 28], and upon the ground that said order of January 26, 1946, was "taken against plaintiff through her surprise and without any opportunity on the part of plaintiff or her attorney to prepare for or present any defense to said motion of defendant upon the merits thereof." [R. 28.] Said motion was not based upon any claim or any ground that any constitutional right had been violated, or that any federal question was presented.

On said motion the plaintiff waived any objection to claim that such a rehearing was not presented to or heard by the court, or had, within the time required by law, and thereby virtually conceded that the court had power to entertain the motion which was made on January 26, 1946. [R. 28.] The plaintiff's said motion was based upon "all of the files, papers, minutes and proceedings herein." [R. 28.] Such papers and proceedings included the entire record of the hearing on January 26, 1946, which was deemed to be a part of the record before the court by stipulation. [R. 47.]

HEARING ON PLAINTIFF'S MOTION FOR REHEARING, MARCH 5, 1946:

The plaintiff's motion for rehearing, filed on February 7, 1946, came on for hearing on March 5, 1946, more than five weeks after the order was made on January 26, 1946, setting aside the default judgment. The motion for rehearing was entertained by the court and was fully presented and argued *in extenso*, as stated in the next to the last paragraph of the opinion of the District Court of Appeal. [R. 74.] The plaintiff did not appear in person at the hearing of her motion for rehearing on March 5, 1946.

FAILURE OF PLAINTIFF TO MAKE ANY SHOWING:

The plaintiff wholly failed to present or indicate by any affidavit or pleading what she proposed to prove by way of opposition to the defendant's motion. The plaintiff's motion for rehearing was not supported by any proposed showing by affidavit or other pleading, as required by Section 473, Code of Civil Procedure.

PLAINTIFF HAD FULL AND FAIR OPPORTUNITY:

The Reporter's Transcript of the proceedings on motion for rehearing heard on March 5, 1946, comprises 36 pages [R. 47-68] and shows that the trial court fully reviewed the matter on March 5, 1946, and that the plaintiff had a full and fair opportunity to present any proposed opposition to defendant's motion at said hearing on March 5, 1946, but wholly failed to do so.

ORDER OF MARCH 5, 1946:

At the conclusion of the plaintiff's motion for rehearing on March 5, 1946, the court denied said motion. [R. 35, 68.]

PLAINTIFF APPEALED FROM BOTH ORDERS:

Thereafter the plaintiff appealed from both orders, namely, the order of January 26, 1946, vacating the default judgment, and the order of March 5, 1946, denying plaintiff's motion to set aside said order of January 26, 1946, and for rehearing. Both of said appeals were considered under one record and one set of briefs, Civil Case No. 15738, Second District, Division One, District Court of Appeal, State of California. [R. 7, 8, 69.]

STATE RECORD ON APPEAL PRESENTED NO FEDERAL QUESTION:

The state record on these appeals presented no claim whatever that any federal question was involved or that appellant had been deprived of any of her rights under the Constitution of the United States. There was nothing in the record upon which the appeals were taken indicating that any right or privilege under the federal Constitution was specially set up or claimed, and no claim was made in the record that any right under the federal Constitution had been violated. The first time the constitutional question was raised was in the petition for hearing by the Supreme Court of California, after decision by the District Court of Appeal, and that petition was denied without opinion or reference to the question. [R. 76, 75.]

BASIC QUESTIONS PRESENTED BY APPELLANT:

The opinion of the Appellate Court quoted from appellant's brief as follows:

> "According to the appellant's brief the basic questions involved are 'Whether the trial court abused its discretion' in granting respondent's motion to set aside the interlocutory judgment, and in later refusing, on appellant's motion, to vacate such order; and

'Whether the trial court had jurisdiction, in any event, to set aside and vacate the interlocutory divorce judgment.' The brief concedes that the matter is one of discretion, but alleges that the respondent husband 'made no adequate showing that his default was taken and judgment taken against him through his mistake, inadvertence, surprise or excusable neglect within the meaning of Code Civ. Proc. Section 473, or otherwise." [R. 72.]

DETERMINATION OF BASIC QUESTIONS PRESENTED BY APPELLANT:

In deciding said basic questions so presented by appellant (petitioner), the Appellate Court said:

"The record herein discloses no abuse of discretion in the vacation of the default interlocutory judgment, either in respect to the matter itself, notice and conduct of the hearing, jurisdiction, consideration of the supporting affidavit, or otherwise. No prejudicial error has been shown and the various contentions of appellant are untenable." [R. 73.]

DECISION ON APPEAL FROM ORDER OF MARCH 5, 1946:

In deciding the questions presented by appellant in regard to her appeal from the order of March 5, 1946, the Appellate Court said:

"The same matter, as hereinbefore indicated, was again brought to the trial court's attention by way of the second motion seeking to vacate the first order. At this second hearing, although the wife did not appear in person, the appellant had full opportunity to present, and must be deemed to have presented, all matters which were in any manner pertinent to the issue.

"[Fol. 137.] Nor is there any merit in appellant's claim that 'The trial court abused its discretion in

denying appellant's motion for an order vacating and setting aside the order setting aside the interlocutory divorce judgment.' No abuse of discretion is disclosed by the record which reveals a substantial showing justifying the order made. By stipulation of counsel the record at the first hearing was deemed a part of the record at the second hearing; the matter was argued *in extenso,* and the trial court again came to the conclusion 'that in equity the matter should be disposed of after a hearing on the merits,' rather than by a default judgment." [R. 74.]

Summary of the Argument.

Point A.

The orders appealed from, and sought to be reviewed by the Supreme Court, were grounded on the construction and application of the state Constitution and state statutory law, and on general principles of law and equity, irrespective of any federal aspects of the case.

Point B.

The record fails to show that any federal question was decided by the state court, either expressly or by necessary intendment, or that the decision of the federal question was necessarily involved in the determination of the cause by the state court.

Point C.

Where the federal question involves a right which must have been specially set up or claimed under Judicial Code, Section 237, subsection (b), it must appear from the state record that it was so set up or claimed in proper manner and time.

POINT D.

A claim of federal right asserted only in a brief filed in the state appellate court is not sufficient to raise a federal question.

POINT E.

A federal question is not properly set up or claimed when presented for the first time in petition for hearing by the highest court of the state, after judgment by the intermediate appellate court, the petition being denied without opinion or reference to the question.

POINT F.

The orders sought to be reviewed were decided upon and are supported by independent and adequate non-federal grounds.

POINT G.

The claim that a federal question is presented is unsubstantial and is so devoid of merit as to be frivolous. It was obviously only a state question.

ARGUMENT.

POINT A.

Only Nonfederal Questions Are Involved in the Case and the Supreme Court Is Without Jurisdiction to Review the Orders of the State Court.

The order was made by the trial court on January 26, 1946, setting aside the default judgment, after considering and holding untenable the objections and contentions made by counsel for plaintiff (petitioner), as follows:

(1) The general objection that the court had no jurisdiction to proceed. [R. 36.]

(2) That the moving papers were not served upon the attorney of record for the plaintiff personally. [R. 38.]

(3) That the court abused its discretion in shortening time of service to one day. [R. 38.]

(4) That the attorney of record for plaintiff was not served within a period of twenty-four hours. [R. 39.]

(5) That the supporting affidavit was served later in the day and not at the same time that the notice of motion was served. [R. 40.]

(6) That counsel for plaintiff was placed in a position where he could not adequately meet the allegations made by the defendant and that therefore he must "stand on the technical grounds" [R. 42] and object to the jurisdiction of the court. [R. 42.]

The applicable state statutes, and the applicable state constitutional provision, under which the regularity and

validity of the various procedural matters involved were determined are here set forth:

Entry of default by clerk:

Code of Civil Procedure, Sec. 585, Subd. 2. (See Appendix.)

Relief from judgment taken by mistake, excusable neglect, etc.:

Code of Civil Procedure, Sec. 473, third section. (See Appendix.)

Order shortening time:

Code of Civil Procedure, Sec. 1005. (See Appendix.)

Service of papers:

Code of Civil Procedure, Sec. 1011, Subd. 1. (See Appendix.)

Due process clause under state Constitution:

"No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property without due process of law."

Constitution of California, Art. I, Sec. 13.

As indicated by the record [R. 36-46], and by the order granting the motion to set aside the default judgment [R. 22], the trial court found that the service of the papers was regular and valid, that notice was sufficient, and that the court had jurisdiction to proceed, and held that the objections and contentions of counsel for plaintiff were untenable.

The order shortening time recited that good cause appeared therefor [R. 12], and in *California etc. Bank v. Graves,* 129 Cal. 649, in upholding the exercise of the power to shorten the time as given by Section 1005 of the Code of Civil Procedure, the court said:

> "It is claimed that the court erred in shortening the time for hearing the application for the writ from five to three days. The power to shorten the time is given by section 1005 of the Code of Civil Procedure. The order of the court reads: 'Good cause appearing to me therefor, it is ordered,' etc. There is nothing in the record to dispute this recital, and we must presume that the necessity for the order was made to appear, and that the power was rightly exercised." (P. 650.)

No showing was made by petitioner disputing that recital in the order shortening time, and on appeal all presumptions and intendments are in favor of and support the regularity and correctness of the order.

Cockrill v. Clyma, 98 Cal. 123;

Thorndyke v. Jenkins, 61 Cal. App. (2d) 119.

The burden was on the petitioner to show an abuse of discretion, which she failed to do.

Thorndyke v. Jenkins, supra.

Due and legal notice was given and the papers were properly served. Service on the attorney of record was good, and service on the party was unnecessary.

Reynolds v. Reynolds, 21 Cal. (2d) 580;

Glesby v. Glesby, 73 Cal. App. (2d) 301;

Code of Civil Procedure, Sec. 1011, Subd. (1).

The objection to the service of the supporting affidavit was untenable.

Hecq v. Conner, 203 Cal. 504.

The law disregards fractions of a day in giving notice.

Gray v. Maier & Zobelein Brewery, 2 Cal. App. 653;

Cosgriff v. Board of Election Commrs., 151 Cal. 407;

Kelly v. State Personnel Board, 31 Cal. App. (2d) 443.

The six months' jurisdictional period under Section 473, Code of Civil Procedure commenced to run at the time of the entry of default by the clerk on July 26, 1945. (*Mac Beth v. Mac Beth,* 219 Cal. 47.) The motion itself must be made and the action of the court requested on it within the six months.

In re Morehouse, 176 Cal. 634.

On plaintiff's motion for rehearing, based on surprise, under Section 473, Code of Civil Procedure, she was required to make a showing by affidavit or other pleading of her proposed opposition to vacating the default judgment, if the order of January 26, 1946, should be set aside, but she wholly failed to comply with that requirement.

Bailiff v. Hildebrandt, 47 Cal. App. 564.

The order vacating default judgment was sustained upon general principles of law and equity, and according to established state law. [See statement in opinion of appellate court, bottom half page R. 72.]

The construction, application and effect of the state Constitution and statutes in the state courts are for the state courts to determine, and questions relating thereto are state and not federal questions.

Memphis & C. Ry. Co. v. Pace, 282 U. S. 241, 75 L. Ed. 315;

Levy v. Superior Court of City and County of San Francisco, 167 U. S. 175, 42 L. Ed. 126;

Lem Woon v. Oregon, 229 U. S. 586, 57 L. Ed. 1340;

Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678;

Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616;

Enterprise Irrig. Dist. v. Farmers Mut. Canal, 243 U. S. 157, 61 L. Ed. 644;

Goodrich v. Ferris, 214 U. S. 71, 53 L. Ed. 914;

Bellingham Bay & B. C. R. Co. v. New Whatcom, 172 U. S. 314, 43 L. Ed. 460;

Wilson v. North Carolina, 169 U. S. 586, 42 L. Ed. 865;

Allen v. Georgia, 166 U. S. 138, 41 L. Ed. 949;

Los Angeles Farming & Milling Co. v. Los Angeles, 217 U. S. 217, 54 L. Ed. 736;

Turner v. Board of Com'rs, 173 U. S. 461, 43 L. Ed. 768;

California Nat. Bank v. Thomas, 171 U. S. 441, 43 L. Ed. 231;

Hurtado v. California, 110 U. S. 516, 28 L. Ed. 232;

Kennard v. Louisiana, 92 U. S. 480, 23 L. Ed. 478;

Kammerer v. Kroeger, 299 U. S. 302, 81 L. Ed. 253.

The construction and application of state laws are for the state courts, and the decisions of those courts are conclusive upon the Supreme Court in so far as the state aspect of the matter is concerned.

Supreme Lodge, K. P., v. Meyer, 265 U. S. 30, 68 L. Ed. 885;

Quong Ham Wah Co. v. Industrial Acc. Comm. of California, 255 U. S. 445, 65 L. Ed. 723;

Iowa Central Ry. Co. v. Iowa, 160 U. S. 389, 40 L. Ed. 467.

In *Leeper v. Texas,* 139 U. S. 462, 35 L. Ed. 225, the court stated:

> "Law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied."

POINT B.

No Federal Question Was Decided by the State Court, and None Was Necessarily Involved in the Determination of the Cause by the State Court.

In *Memphis Natural Gas Co. v. Beeler,* 315 U. S. 649, 86 L. Ed. 1090, the court stated:

> "Since it does not appear that the validity of the statute was either drawn in question or passed upon in the trial court or deemed by the state Supreme Court to be in issue, we must dismiss the appeal for want of jurisdiction." (86 L. Ed., p. 1094.)

No definite issue as to any federal claim or question was deducible from the record before the state court, and it cannot be held to have disposed thereof by its decision which is entirely silent in regard to any such claim or question.

Seaboard A. L. R. Co. v. Duvall, 225 U. S. 477, 56 L. Ed. 1171;

Live Oak Water Users' Ass'n v. Railroad Comm. of California, 269 U. S. 354, 70 L. Ed. 305;

Zadig v. Baldwin, 166 U. S. 485, 41 L. Ed. 1087;

Chicago & N. W. Ry. Co. v. Chicago, 164 U. S. 454, 41 L. Ed. 511;

Southwestern Bell Tel. Co. v. Oklahoma, 303 U. S. 206, 82 L. Ed. 751;

Mellon v. O'Neil, 275 U. S. 212, 72 L. Ed. 245.

The reviewable character of the decision of the highest state court and what was drawn in question and decided may be ascertained from its judgment and opinion. (*Burbank v. Ernst,* 232 U. S. 162, 58 L. Ed. 551.) The opinion of the state court may be regarded and considered by the Supreme Court as part of the state record.

Indiana v. Brand, 303 U. S. 95, 82 L. Ed. 685.

POINT C.

No Federal Question Was Raised and No Constitutional Right Was Set Up or Claimed in an Adequate Manner or at an Appropriate Time.

The specific question sought to be reviewed was not set up or claimed in proper manner or time. (*Keokuk & H. Bridge Co. v. Illinois,* 175 U. S. 626, 44 L. Ed. 299; *F. G. Oxley Stave Co. v. Butler County,* 166 U. S. 648, 41 L. Ed. 1149.) In the case last cited, the court stated:

> "The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court." (41 L. Ed. p. 1152.)

Schuyler Nat. Bank v. Bollong, 150 U. S. 85, 37 L. Ed. 1008;

Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, 86 L. Ed. 1090;

Miller v. Cornwall, 168 U. S. 131, 42 L. Ed. 409;

Capital Nat. Bank of Lincoln v. First Nat. Bank of Cadiz, 172 U. S. 425, 43 L. Ed. 502;

Michigan Sugar Co. v. Dix, 185 U. S. 112, 46 L. Ed. 829;

Thomas v. Iowa, 209 U. S. 258, 52 L. Ed. 782;

Louisville & N. R. Co. v. Smith, Huggins & Co., 204 U. S. 551, 51 L. Ed. 612;

El Paso & S. W. R. Co. v. Eichel & Weikel, 226 U. S. 590, 57 L. Ed. 369;

Hiawassee River P. Co. v. Carolina Tenn. P. Co., 252 U. S. 341, 64 L. Ed. 601.

The challenge below to the jurisdiction of the court was entirely referable to the state Constitution and

statutes and did not constitute any assertion of a federal right. (*Bowe v. Scott,* 233 U. S. 658, 58 L. Ed. 1141.) In the case last cited the court stated:

> "But it is settled that such an averment, making no reference to the Constitution of the United States, and asserting no express rights thereunder, is solely referable to the state Constitution, which, in this instance, has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court." (58 L. Ed. 1145.)

Kipley v. Illinois, 170 U. S. 182, 42 L. Ed. 998;

New York Cent. & H. River R. Co. v. City of New York, 186 U. S. 269, 46 L. Ed. 1158;

Hamblin v. Western Land Co., 147 U. S. 531, 37 L. Ed. 267;

Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. Ed. 171;

Marvin v. Trout, 199 U. S. 212, 50 L. Ed. 157;

Clarke v. McDade, 165 U. S. 168, 41 L. Ed. 673.

The specific federal question which it is sought to have reviewed must have been drawn in question in the state court.

Bailey v. Anderson, 326 U. S. 203, 90 L. Ed. 3.

POINT D.

A Claim of Constitutional Right Is Not Sufficient to Raise a Federal Question When Merely Asserted in a Brief or Oral Argument in the Appellate Court.

Zadig v. Baldwin, 166 U. S. 485, 41 L. Ed. 1087;

New York Central & H. R. R. Co. v. New York, 186 U. S. 269, 46 L. Ed. 1158;

Sayward v. Denny, 158 U. S. 180, 39 L. Ed. 941.

POINT E.

An Unsuccessful Petition to the Highest State Court Which Asserts a Claim of Constitutional Right, After Judgment by the Intermediate Appellate Court, Is Not Sufficient to Raise a Federal Question.

A federal question is raised too late where it is first presented to the state court on petition or motion for rehearing which is denied or dismissed by the state court, without opinion or reference to the question.

Herndon v. Georgia, 295 U. S. 441, 79 L. Ed. 1530;

American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231;

Live Oak Water User's Assn. v. Railroad Comm. of California, 269 U. S. 354, 70 L. Ed. 305;

Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 47 L. Ed. 480;

Miller v. Cornwall R. Co., 168 U. S. 131, 42 L. Ed. 409;

Sayward v. Denny, 158 U. S. 180, 39 L. Ed. 941.

A federal claim is made too late where first made in an unsuccessful petition to the highest court for review of the judgment of an intermediate appellate court of the state.

El Paso & S. W. R. Co. v. Eichel & Weikel, 226 U. S. 590, 57 L. Ed. 369;

Chicago I. & L. Ry. Co. v. McGuire, 196 U. S. 128, 49 L. Ed. 413;

St. Louis & S. F. R. Co. v. Shephard, 240 U. S. 240, 60 L. Ed. 622;

Bowe v. Scott, 233 U. S. 658, 58 L. Ed. 1141.

POINT F.

The Orders of the State Court Are Supported by Independent and Adequate Non-federal Grounds.

Where independent non-federal grounds adequate to support the decision appear, the Supreme Court will not review the state judgment.

Eustis v. Bolles, 150 U. S. 361, 37 L. Ed. 1111;

Allen v. Arguimbau, 198 U. S. 149, 49 L. Ed. 990.

In the instant case, as pointed out above, the orders were sustained by the state court under the established law of the state based on principles of law and equity, the state Constitution and statutory laws, and no federal question was presented or discussed or decided.

Lynch v. N. Y. ex rel. Pierson, 293 U. S. 52, 79 L. Ed. 191;

Leathe v. Thomas, 207 U. S. 93 52 L. Ed. 118;

Fox Film Corp. v. Muller, 296 U. S. 207, 80 L. Ed. 158;

Utley v. City of St. Petersburg, 292 U. S. 106, 78 L. Ed. 1155;

Enterprise Irr. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157, 61 L. Ed. 644;

Eustis v. Bolles, 150 U. S. 361, 37 L. Ed. 1111.

POINT G.

The Claim That a Federal Question Is Presented is Frivolous Where It Is Obviously Only a State Question.

Kammerer v. Kroeger, 299 U. S. 302, 81 L. Ed. 253;

Quong Ham Wah Co. v. Ind. Acc. Comm., 255 U. S. 445, 65 L. Ed. 723;

Delmar Jockey Club v. Missouri, 210 U. S. 324, 52 L. Ed. 1080;

Wilson v. North Carolina, 169 U. S. 586, 42 L. Ed. 865;

Goodrich v. Ferris, 214 U. S. 71, 53 L. Ed. 914;

Bellingham Bay B. C. R. Co. v. New Whatcom, 172 U. S. 314, 43 L. Ed. 460;

Kennard v. Louisiana, 92 U. S. 90, 23 L. Ed. 478.

No federal question was properly raised in the state courts, no federal question was decided by the state courts, and it was not necessary to a determination of the case by the state courts that any federal question be decided, and the opinion is entirely silent in regard to any federal question.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in the Supreme Court, and that the petition for a writ of certiorari should be denied.

Dated: February 9, 1948.

JOHN STEWART ROSS,
Counsel for Respondent.

CLYDE C. SHOEMAKER,
Of Counsel.

APPENDIX.

Code of Civil Procedure, Section 585, subdivision 2:

"In other actions, if the defendant has been personally served and no answer or demurrer has been filed with the clerk or justice of the court within the time specified in the summons, or such further time as may have been granted, the clerk, in courts having a clerk, must enter the default of the defendant; and thereafter the plaintiff may apply to the court for the relief demanded in the complaint; * * *."

Code of Civil Procedure, Section 473, third section:

"The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken."

Code of Civil Procedure, Section 1005:

"When a written notice of a motion is necessary, it must be given, if the court is held in the county in which at least one of the attorneys of the party notified has his office, five days before the time appointed for the hearing; otherwise, ten days. When the notice is served by mail, the number of days before the hearing must be increased one day for every full one hundred miles of distance between the place of deposit and the place of service; such increase, however, not to exceed in all thirty days; but in all cases the court, or a judge or justice thereof, may prescribe a shorter time."

Code of Civil Procedure, Section 1011, subdivision 1:

"The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them between the hours of nine in the morning and five in the afternoon, in a conspicuous place in the office; or, if it is not open so as to admit of such service, then by leaving them at the attorney's residence, with some person of not less than eighteen years of age, if his residence is in the same county with his office; and if his residence is not known, or is not in the same county with his office, or being in the same county it is not open, or there is not found thereat any person of not less than eighteen years of age, then by putting the same, inclosed in a sealed envelope, into the postoffice directed to such attorney at his office, if known; otherwise to his residence, if known; and if neither his office nor his residence is known, then by delivering the same to the clerk of the court, or to the justice where there is no clerk, for the attorney;".